UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 09-50026

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In the Matter of:

GENERAL MOTORS CORPORATION,

Debtor.

- -x

United States Bankruptcy Court

One Bowling Green

New York, New York

June 23, 2009

2:08 PM

B E F O R E:

HON. ROBERT E. GERBER

U.S. BANKRUPTCY JUDGE

HEARING re Motion to Appoint an Official Committee of Family & Dissident Bondholders.

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P R O C E E D I N G S

THE COURT: Seats please. Okay. GM, we're here on the motion of the ad hoc committee of family and dissident GM bondholders asking me to appoint an additional committee.

I've read the papers and I think I understand them. We get motions of this type a lot. Mr. Richman, good afternoon.

MR. RICHMAN: Good afternoon, Your Honor.

THE COURT: I'll hear from you first. As I said, you can assume that I've read the papers and I've understood them.

MR. RICHMAN: Thank you, Your Honor. May I take the podium?

THE COURT: I would ask that you do.

MR. RICHMAN: Good afternoon, Your Honor. Michael Richman, Patton Boggs for the Unofficial Committee of Family and Dissident GM Bondholders.

Your Honor, when we first filed our motion and request for official committee recognition we had asked that it be heard prior to the June 19 deadline for objections to the Section 363 transaction. It turns out that having this hearing today, four days after the deadline has passed, is very important and material to the motion for the following reason, neither the official committee nor the two indentured trustees who sit on the official creditors committee appear to have raised any substantive objection to the fast track Section 363

transaction.

This demonstrates, conclusively, that our group, which did file a very substantial objection, is not adequately represented within the meaning of the statute. And an even stronger case than the one we made in our opening papers is made for official committee recognition under Section 1102(a)(2). But there is much more here that supports a compelling need for an independent official committee recognition, which I will get to shortly.

Also, I should note other developments of a factual nature since we filed the motion. It appears that over thirty separate objections have now been filed and the number keeps growing every time I look at my BlackBerry by a whole variety of individual bondholders who would be part of a larger constituency that we hope to be able to represent. And I would submit that an additional factor for the Court to consider would be whether the hearings on the Section 363 transaction and other activities in the case, particularly with this large number of individual clamoring to be heard would be best organized under an official committee that represents those interests.

First, I want to update you briefly on the unofficial committee, a committee of small bondholders who are looking for a voice in these cases. Since the time we filed our committee recognition motion, the number of bondholders who have

registered through the website, Main Street Bondholders, which is the main way that our unofficial committee networks with the larger community of small bondholders, has grown from 1,500 to approximately 2,000. We believe that the face value of the bonds represented is now more than 500 million dollars.

According to the best information we've been able to obtain to date, there were approximately twelve series of institutional bonds issued by GM and outstanding as of the petition date there were five series of foreign currency debt issues, six issues of retail bonds and notes and four series of convertible debentures. Most of the holders in our group, we believe, are in the retail bond and note series and the convertible debt series, some of which had face values as small as twenty-five dollars.

THE COURT: Pause please, Mr. Richman. Because when I read your motion I also looked at your 2019, which referred to three individuals. Has there been an updated 2019 documenting the extent to which you represent anybody other than those three people, putting aside the deficiencies articulated by the U.S. Trustee vis-a-vis the disclosures on the three people?

MR. RICHMAN: On that point, Your Honor, first I would note that until I received the trustee's papers, and I've had a number of very cordial discussions with the office which I thought gave us a fair hearing on our letter request for appointment by the trustee's office. And at no time did

anybody suggest to me that there was any defect in the 2019. And had that been pointed out to us and we'd been asked to supplement it, we would.

THE COURT: Well you know what 2019 says.

MR. RICHMAN: I know what it says and we are -- we don’t represent anybody -- my firm represents only the unofficial committee of three. And we were careful to say in our papers that that committee, through its network with the larger community of bondholders, is hoping to have official status to represent them. And at least informally, there is a belief in that bondholder community that that committee is serving its interest even though I don't have an attorney/client relationship with any other individual bondholders nor even the three on the committee. The engagement is with the committee itself as an entity.

As far as their holdings are concerned, we did disclose their holdings and we are preparing a supplement to disclose any trading activity or anything else that's encompassed within the rules for positions that might have been acquired in the last year and that's easily done. And whatever the trustee's office wants, by way of disclosure, that we can provide we will provide. But I say to Your Honor, we have not expanded the unofficial committee membership beyond the three individuals that we identified in our papers.

THE COURT: Okay. Continue, please.

MR. RICHMAN: Thank you, Your Honor. On June 12 we reached out to this network through the website and asked people to share with us more information about their holdings and their circumstances. I'm trying, in as much as I've stated our beliefs about the nature of this bondholder community and how it is very distinct from the institutional bondholders that have been represented in the case; I'm trying to do what I can to gather as much verifiable information as possible.

We received details reports, so far, from 150 members of the larger group. And I'm not claiming this is a scientific survey, Your Honor, it's just illustrative. But of the 150 who wrote to us, eighty-six percent of them purchased their bonds between eighty and a hundred cents. A stunning sixty-eighty percent of this group reported to us that the potential losses to them and their GM bondholders will affect their lives in significant and detrimental ways.

More than half of them reported to us that they had been living off the interest or --

MR. MILLER: Excuse me, Your Honor.

MR. RICHMAN: -- using the interest as an important source to supplement their retirement.

THE COURT: Just a minute please, Mr. Richman.

MR. MILLER: Your Honor, I don't understand. Are these facts? Is this supposed to be in evidence? This is all hearsay.

THE COURT: Of course it's hearsay. If it were admissible by a witness and it's, in substance, a lawyer testifying. The objection is sustained, Mr. Richman.

MR. RICHMAN: Your Honor, I'll move on.

THE COURT: You've got to stay within the confines of the objection that you filed.

MR. RICHMAN: I will, Your Honor. I just thought it important to give Your Honor the flavor of the people that we're dealing with and hearing with on a daily basis. I appreciate it's not evidence but I felt it was important that --

THE COURT: Mr. Richman, we've got to move on. After I rule, I rule.

MR. RICHMAN: Thank you, Your Honor.

THE COURT: Thank you.

MR. RICHMAN: The statute provides a very simple, broad discretionary standard for an additional committee. The statute says, and I quote, "If necessary to assure adequate representation of creditors." Some of the objectors citing some previous cases have argued that the appointment of an additional committee is an extraordinary remedy and some courts have said that. Courts addressing Section 1102(a)(2) have also articulated roughly six factors that they believe should be used to evaluate such requests and all of us have made efforts to address those factors.

I will, in a minute, summarize the factors and the party's arguments while showing that in the facts of this case all the factors support the appointment of our group as an additional official committee. But I want first to emphasize that the text of the law, the words of the statute, provide only that this Court needs to determine if the additional committee is necessary in the circumstances of the case to assure the adequate representation of creditors. There's nothing in the statute that suggests that the relief should be considered extraordinary or rarely granted nor requiring any special burdens.

Before I get to the non-exclusive factors that all the parties have discussed, I want to urge Your Honor to weigh heavily an important factor that is not among the non-exclusive six but one that I believe overrides this entire case and subsumes a number of the factors. Will the appointment of a separate official committee of non-institutional family and dissenting bondholders protect and enhance the integrity of the bankruptcy process? Or stated differently, will it enhance the administration of justice in this case? The answer to both of these important questions is resoundingly yes.

This case is being watched widely and closely both here and around the world. People want to know whether the legal system that we promote around the world and which has been copied in many parts of the world is as fair and provides

the kind of due process and protection of dissident rights as we say it does. They see that the government has powered its will over GM in the months leading to the bankruptcy filing and they now see that the only official committee in the case, as well as the two indentured trustees on that committee, have apparently lined right up with the government and the debtors for a fast track Section 363 transaction that would, as a practical matter, end run due process and creditor protections built into the plan process.

The government is the debtor. It is the debtor's lender and it is the new GM purchaser. It is paying the legal expenses of all of those parties and we have also heard that the government has agreed to pay the legal expenses of the ad hoc committee of institutional bondholders who have also not opposed the 363 transaction.

In the circumstances vitally important in our system of adversarial process and justice, there's a serious question whether and to what extent this Court will receive anything close to a full airing of the important, substantive and procedural issues that are raised in this case.

In a case of this magnitude, with issues of such importance, we believe that the Court should hear both sides and have the benefit of the full throated debate and the intendant evidence that is the essence of our adversarial system of justice. Giving our group official committee status

will enable us to vigorously present the other side. It will promote overall transparency and justice. And however this Court ultimately decides the issues, the public will be better informed, with a better understanding of the choices that were made and why.

Equally related to the important issue of enhancing the administration of justice and the bankruptcy system is the importance of going so far as is reasonably possible to assure that any appearance of conflict or unfair influence is mitigated. The United States Trustee does an excellent job and the comment I'm about to make should not be construed as any criticism of her performance here or in any other case. But it is a fact that the trustee's office, which appoints the official committee in this case, is part of the same executive branch of the government that is the unitary voice for the fast track Section 363 transaction in this case.

In the unique circumstances of this case and especially where the official committee is now silent on this key transaction, it is a legitimate question whether the committee was selected and balanced in such a way as to predetermine their position in favor of the government's plan.

We are constrained to ask where a fast track 363 transaction will walk in discriminatory treatment between different classes of legally similar unsecured creditors, namely the UAW claims and the claims of the bondholders and

other general unsecured creditors, how is it possible that there is no substantive objection from the official committee that is supposed to represent all unsecured creditors equally or even from the two indentured trustees who sit on that committee.

An additional official committee, independent of the trustee's office, independent of the government and free from whatever politics have restrained the official creditors committee or the indentured trustees on the committee from speaking out will be able to give this Court and the public the important benefits of vigorous opposition and the airing of issues that the bankruptcy process and the sound administration of justice requires.

I want to turn now to the six factors, Your Honor, that have been identified by some of the courts and objectors to see whether and to what extent they figure into an appropriate analysis of the need for an additional committee in this case. The first one is the ability of the existing official committee to function.

The debtors argue that the F&D bondholders, for family and dissident GM bondholders, are adequately represented by the official creditors' committee because they say that committee has a fiduciary duty to protect all unsecured creditors and because it includes two indentured trustee representatives who are also duty bound to represent the interests of all

bondholders.

The U.S. Trustee adds that there is no indication that the official committee has not been able to function effectively. The official committee makes similar points arguing that we have not established that the committee is failing to function. But with all due respect to the courts that have made this a factor, the issue is not whether the official committee can function but rather, as the statute expressly suggests, whether it is providing adequate representation.

THE COURT: Pause please, Mr. Richman. Because, as you properly observed, the six factors have been set forth in a bucket of cases, at least in Enron and Dana in this district. I think down in Winn Dixie in the Middle District of Florida and elsewhere. When we bankruptcy judges do our job, we start with a statute. We start with textual analysis. But if we were to rely on textual analysis alone there would be no Lionel. The Lionel decision points out that 363 doesn't place any limits on the ability of a debtor to engage in a 363 sale. And yet, it was the start of a body of case law. Do I, as a judge, have the ability to ignore what may be at least three, four or five decisions in this district and dozens around the country that set forth those statutory factors?

MR. RICHMAN: Well Your Honor, I don't --

THE COURT: Set forth those factors in implementation

of the statute even though the words of the statute don't set them forth.

MR. RICHMAN: I don't suggest, Your Honor, that you ignore them. In fact, I'm trying to suggest and I'll try to do it a little better, that those factors properly construed with the statute and the statutory test support the appointment of an additional committee in this case.

What I'm saying, on this particular factor the functioning of a committee, it's possible that there may be some cases in which somebody's going to argue that a committee is deadlocked and is unable to function. But I don't think anyone's argued that that's what this factor means in this case. And if it were simply a matter of the committee being able to --

THE COURT: Well, it's what it generally means isn't it?

MR. RICHMAN: I think it can mean a lot of different things. And what I'm suggesting is that viewed in light of the statute and viewed in light of this case, where the statute says that the test is adequate representation, then to me, looking at the factor of effective functioning, it's whether the creditors' committee can function to provide the adequate representation that the statute says one looks at. This creditors' committee may be able to function but it is effectively silent on the issues affecting the bondholders and

other unsecured creditors. So in respect of adequate representation the committee is not functioning adequately.

The second factor, Your Honor, is called the nature of the case. The objectors argue that the large size of a case is not a reason, in and of itself, for an additional committee where the dissenters are adequately represented by the official committee. But as I've just argued, we contest with as much protest as possible, that we are not being adequately represented by the committee, particularly this is not just a large case. This is a large case in which the multiple hats that are worn by the government and the government's relationship with the debtors and the justice department show a need for a creditors' committee that is truly independent.

Further, as I've argued before, it's inconceivable that the dissident bondholders could be said to be adequately represented by the official committee when neither the committee nor the indentured trustees, who are supposed to be their representatives on the committee, are giving any voice to their grievances.

The third factor is the standing and desires of the constituencies. We argued in our motion that the F&D committee constituency is distinctly different from the institutional bondholders whose indentured trustees sit on the committee. And at least on this point the official committee agrees with us. But they argue that this does not establish a lack of

adequate representation. The debtors argue, and this is my new favorite sentence in any brief that I've ever seen written against the position I've taken, the debtors argue that the fact that our interests are diametrically different from the official committees is, and I quote, "A mental attitude that is incorrect."

I will agree that some people think that we're insane to be standing in opposition to this process. But the real point is adequate representation. This is just another way of expressing it. The institutional bondholders have different economic considerations, a different class of bonds, they had a seat at the table, many of them agreed to a deal before the case filed. There's a question as to whether the indentured trustees on the committee have their positions predetermined before the case. They do not and cannot adequately represent us, that's something more than just a substantial difference in mental attitude.

The fourth factor is the ability to continue participating and recover costs. Both the debtors and the official committee say that the F&D committee is represented by experienced and competent counsel who can continue to represent them in these cases and for that we are grateful. This factor also usually invites a discussion of the eligibility of unofficial committees for fees and expense recovery under the substantial contributions standard of Section 503(b). And the

U.S. Trustee makes that point in its objection.

The debtors say, baldly, that under this factor the Court should view our request as essentially one to transfer the costs of our professionals to the debtors. However, this factor just summarizes a truism in virtually all the 1102(a)(2) cases and it should not have any real weight. In most cases the motion for an official committee is likely to be prosecuted by a law firm of substances. And in virtually every case it will be a fact that an unofficial committee that is not granted official committee status will be able to seek reimbursement of its fees and expenses under 503(b). It's inconceivable that standing here seeking official committee status one would not feel that one will be able to make a substantial contribution to the case.

And 1102(a)(2) and 503(b) exactly overlap in their permission for the appointment of committees, of creditors or equity security holders and in the reimbursement for substantial contribution. In other words, if the availability of 503(b) reimbursement is a legitimate reason to deny official recognition under 1102(a)(2), then 1102 would be a nullity.

On the economic points embedded in this factor and the objector's arguments, just because the bondholders were able to get us to this point does not mean that they have anything near the means to mount a vigorous and effective opposition, they do not. We've been hearing from them in waves, since word got out

that we were trying to represent the committee. Of course the benefit of a state coverage of fees and expenses is the principal and salient objective of 1102(a)(2). So accusing somebody of trying to shift professional fees to the estate is a nonfactor, that's what the statute is designed to do. That's the main reason people seek official committee status. And in this case those resources would empower this committee to do far more then it could ever do as a practical matter in giving voice to the objections to this process as well as full participation in a plan process. Including, importantly, the ability to retain financial advisors to provide expert opinions to counter the opinions that will be paid for by the government.

This flows directly into the fifth factor, Your Honor. The question whether or not the additional cost to the estates is justified. The debtors say it's not justified because it will delay consummation of the 363 transaction and lead to duplicative efforts in these cases, which would add no value to the administration of these cases. And the official committee also claims it will lead to duplication of efforts and they worry that the added costs will affect creditor recoveries.

Well as for the claim of duplicative efforts, please somebody tell me whose work we would be duplicating. The official committee is not objecting to the transaction, we would be. That's not duplication. And can the debtors

legitimately argue that the costs are not justified because they would be used to delay the 363 transaction? Absolutely not. That just speaks volumes about the desire of the debtors to silence this committee, limit its ability to function and otherwise choke any opposition. And it's completely untrue.

As our objection to the 363 transaction makes clear, we are in favor of seeing New GM created within the sixty to ninety days that the government and the debtors promised the world that they would be seeking to create New GM when they filed this case. Our position is that this should be done in an accelerated plan process and not through a fast track 363 sale that will predetermine creditor recoveries outside a plan process. To use the fact that we are substantively in opposition to the strategy of the debtors as a means to deny us funding as a voice in the process is not a legitimate objection.

Lastly, the sixth factor called other considerations. The debtor's main argument under this factor, which is now also joined in by the official committee, again has nothing to do with the statutory requirement of whether or not we are adequately represented but rather their concern that empowering us will delay the 363 transaction.

The official committee says that they are concerned that there could be confusion if we differ from the approach that they are taking. In other words, again, both the debtors

and the official committee would prefer that our opposition be silenced or limited.

So to sum up, the failure of the official committee and the two indentured trustees on that committee to object to any aspect of the proposed fast track 363 transaction, which for all intents and purposes is the core of this case and will predetermine unsecured creditor distributions in a manner that discriminates against bondholders, demonstrates on its face that the existing representation of the official committee is not adequate. Adequate representation has to mean something more than that there is a committee in existence to protect unsecured creditors or that it merely includes representatives of the same class seeking official recognition.

The integrity of the bankruptcy process is the central issue, especially if by choking off this large constituency of small bondholders the Court is unable to hear vigorous opposition. The integrity of the process is key where the government is governing the debtor and its decision making and lending the DIP money and masterminding the so-called purchase. The administration of justice is implicated where in this unusual case the only official committee is appointed by the same branch of government wearing the management, lender and purchaser hat.

These appearances and processes demand that there be a vigorous airing of issues through an opposition given official

voice in this process. Whatever this Court eventually decides, the administration of justice and the integrity of the bankruptcy process will be protected, upheld and honored if the Court is able to have the benefit of the full professional presentation of opposing views, law and evidence.

Thank you, Your Honor.

THE COURT: Thank you. All right. Mr. Miller, I'll hear from you and U.S. Trustee's office then the creditors' committee, then anybody else who wishes to weigh in.

MR. MILLER: Good afternoon, Your Honor. Harvey Miller, Weil Gotshal & Manges for the debtors. If Your Honor please, the argument which is being made by Mr. Richman basically when you cut to the core is the fact that Section 1102 has been interpreted by courts, and there are ample decisions in this district as to the responsibility and burden that is on the moving party that should be ignored. The Enron decision, the Winn-Dixie decision, Dow Corning, the Oneida decision, all of these decisions should be ignored.

The standard for the appointment of an additional committee is a high standard. There is a burden of proof that is put on the moving party to establish that there is a lack of adequate representation, Your Honor. And the only lack of adequate representation that we hear is that Mr. Richman believes that this creditors' committee, the official committee that's been appointed in this case, has failed to adequately

represent the bondholders because it hasn't objected to the 363 sale.

That means, Your Honor, if you take his principal to its logical extreme, any time a group of creditors is in a difference of opinion with the creditors' committee there should be an additional committee appointed. And that, Your Honor, is clearly not the law.

A review of the applicable determinative factors, Your Honor, demonstrates that the GM bondholders are adequately represented by the official committee. And what did the U.S. Trustee do here, Your Honor? At the organizational meeting it interviewed many of the creditors who appeared at that meeting. The U.S. Trustee appointed a fifteen member committee, including two indentured trustees. In point of fact, Your Honor, when Mr. Richman and inquiries made of Mr. Richman as to whether any one of these three ad hoc committee members would serve on the official committee, the answer was no. So the whole purpose of this, Your Honor, is to have a committee that can object to the 363 sale and have its expenses paid by the debtor's estates. That's not a lack of adequate representation Your Honor. That's a difference of opinion with the official committee. And I don't really know where Mr. Richman is going about they haven't objected, the time to object or to file responsive papers on the part of the official committee has not yet expired. The official committee has not yet filed whether

it supports, objects or whether it has a limited objection. So I don't know exactly what Mr. Richman is replying to.

There is no requirement, Your Honor, that a creditors' committee must represent every different interest in the creditor community. And that has been established in many cases, including the Sharon Steel case. The best committee, Your Honor, is a committee of diverse interests and that's exactly what the U.S. Trustee attempted to do here.

In accordance with Section 1102(b)(1), the committee represents the different kinds of claims which have been asserted and which will be involved in this Chapter 11 case. And I believe the U.S. Trustee carefully selected this committee so that it would represent the different kinds of claims in this case.

So we have the two indentured trustees, Your Honor. And indentured trustees have an obligation, not only to represent institutional bondholders but to represent all the bondholders that are covered by that indenture, and that includes the retail bondholders as well as the institutional bondholders. And in addition to that, Your Honor, we have an ad hoc committee of bondholders.

As Your Honor may recall, at the first day hearings Mr. Rosenberg from Paul Weiss appeared and that ad hoc committee represents a committee which is, if I recall correctly, in dollar amount represents more than fifty percent

of the outstanding bonds. That's almost, Your Honor, fourteen billion dollars worth of bonds.

So we're in a situation today where this ad hoc family and dissident bondholders group has one objective, they want to file -- they have filed an objection to the 363 sale. They have predetermined, Your Honor, that this Section 363 sale should not be approved. How did they make that determination? They didn't do any research, they haven't reviewed the transaction but they have already determined and they want Your Honor to approve the appointment of this additional committee so they can pursue this objection which is made on the basis of their own conclusions because of the insolvent state of General Motors.

Now, if that is the basis for the appointment of additional committees, Your Honor, then I suggest to Your Honor we're going to have a lot of additional committees in this case. We also already have motions for other additional committees and if the sole difference, Your Honor, is we don't agree with the official committee that this may be a proper cause of action, that does not establish adequate -- a lack of adequate representation. And in point of fact, Your Honor, the ad hoc family and dissident bondholders committee, they can present those objections.

Mr. Richman made a very able presentation today; he can make another able presentation when the 363 transaction

comes up. They have demonstrated today that they have the capacity to object and to take whatever action they deem appropriate. And Mr. Richman stood at this lectern, Your Honor, and said we will make a substantial contribution. Well if he is so sure they're going to make a substantial contribution, then he should have no problem because Section 503(b) will be there when it is demonstrated that he has made a substantial contribution. We don't believe that he will make a substantial contribution. And we don't believe, Your Honor, that these debtors' estates should bear the cost because he is dissatisfied with the composition of the official committee.

What the U.S. Trustee did, Your Honor, was to comply with the statute, to comply with the precedents in this district and appoint a representative committee. And Mr. Richman, Your Honor, has not established a lack of adequate representation. This committee is represented, it is functioning, it has been engaged ever since its appointment on June 3rd in getting information and dealing with the issues in this estate.

Mr. Richman's committee represents apparently a very small group of bondholders. If we're going to have additional committees for a small group of bondholders when they have representation on the official committee, Your Honor, as I said before, we are going to end up with a lot of additional committees in this case, which would be inappropriate and would

be inefficient in the administration of these estates, Your Honor. There is no justification, at this point in time, Your Honor, for the appointment of an additional committee of bondholders. And the large size of the case and the circumstances of the case, Your Honor, do not mean that there's a lack of adequate representation. The U.S. Trustee took that into consideration. This is a committee that has two indentured trustees on it, is ably represented by attorneys, ably represented by financial advisors and has been discharging its function.

Mr. Richman can't point to any lack of adequate representation except the one that he pursues, Your Honor, and that is the committee hasn't objected. That does not establish a lack of adequate representation, Your Honor. There may be a difference between the official committee and the ad hoc committee. That doesn't prove or establish in accordance with the high standard that is required in this district, that there is a lack of adequate representation. There will be differences and there are differences, I'm sure, within the committee, Your Honor. And that's why the Code says you should appoint a committee that represents the different kinds of claims. And it's within the committee process that those claims are resolved by debate, by dialogue within the committee. Mr. Richman's clients don't even want to serve on that committee. They might have had the opportunity to serve

on that committee yet they rejected it, Your Honor.

What the U.S. Trustee did was discharge her functions in accordance with the Bankruptcy Code and appointed a very representative committee. And nothing has been established here today except, Your Honor, a lot of rhetoric about the integrity of the Court. What happened here was a compliance with the provisions of the Code, the appointment of a representative committee and a total failure of establishing a lack of adequate representation in these cases, Your Honor. All we have heard is the official committee will not object, therefore we must have another committee on the basis of a predetermined judgment that this proposed Section 363 transaction should not be approved. That's not establishing a lack of adequate representation, Your Honor.

So we would submit to Your Honor, in consideration of the seven factors and what has been put forth today, there has been no proof meeting the standard that is imposed upon a moving party that there's a lack of adequate representation by the official committee. And we urge Your Honor to deny the motion.

Thank you, Your Honor.

THE COURT: All right. Thank you. Ms. Riffkin, Mr. Masumoto, U.S. Trustee's office.

MR. MASUMOTO: Good afternoon, Your Honor. Brian Masumoto for the Office of the United States Trustee.

As Your Honor is aware, the United States Trustee filed a response to the motion of the unofficial family and dissident bondholders for an order directing the United States Trustee to appoint a separate committee.

In our response the United States Trustee asked the Court to deny the motion because the unofficial committee failed to demonstrate that the appointment of a separate family and dissident bondholder committee isn't necessary for the adequate representation of that group of bondholders interest.

Before addressing the merits of the case the United States Trustee would like to point out or to discuss the requirements under Rule 2019.

As indicated by counsel, the Federal Rules of Bankruptcy Procedure, Rule 2019, specifically Rule 2019(a)(4), requires the disclosure by the members of the unofficial committee with respect to their bondholdings. And in particular the times when acquired, the amounts paid therefore and any sales or other dispositions thereof.

Given the appearance of all the parties today, Your Honor, the U.S. Trustee does not request that this proceeding do not go forward. In fact, however, we do ask that the Court withhold its decision pending disclosure of the requirements under the Rule 2019. In part --

THE COURT: Mr. Masumoto, if your opponent, in this case Mr. Richman, had stonewalled you and indicated an

unwillingness to comply, I would give the point you made a lot of serious consideration. But I wonder whether in light of the desire, if not also a need, of many constituencies in this case to keep things moving forward that a guy in my position should triage those matters and try to address parties needs and concerns as quickly as possible and only hold up things when its really necessary to do that.

As I said, he said he's going to give you compliance. Mr. Richman's a man of honor, at least I've always thought of him as such and I take his commitment as good enough for me for now, wouldn't you?

MR. MASUMOTO: Your Honor, and from the standpoint of the U.S. Trustee that's fine once compliance is met. The only concern that we have is that if in fact these requirements are not met is essentially a license to future movants in other cases to avoid the requirements of the rule and nevertheless seek a disposition of their motion. And in fact in this case we don't believe, given the representation that the disclosure will be made, we believe that there ostensibly should be very little delay in making the decision. However, delaying it until the disclosure is made does enforce the requirements of the rule and indicate the importance of that disclosure. In fact, the disclosure may in fact inform the Court as well to the other parties in interest as to the various motivations of the parties and the determination of the various factors set

forth to determine adequate representation.

Having said that, Your Honor, I do believe that as, certainly as indicated by the debtor's reply as well as the official committee's reply with respect to the motion, we believe that certainly even not taking into account any of the undisclosed information there's sufficient facts to determine that the unofficial committee is adequately represented and therefore does not require the appointment of a separate committee.

So having said that, I would like to move on to the merits of the under Section 1102(a)(2) regarding adequate representation. As indicated and acknowledged by all the parties, the norm is the appointment of a single committee. And that in fact the appointment of a separate committee is an extraordinary remedy.

Furthermore, as indicated by debtor's counsel, the burden is on the moving party to establish the need for a separate committee in order to provide adequate representation. As indicated, adequate representation is not defined by the code and in fact various case laws have identified factors to consider in making that determination. Essentially the analysis seems to devolve on a case-by-case analysis of the various factors that relate to the particular circumstance. And in that regard, Your Honor, I would like to indicate that the typical starting point is the formation of the official

committee of unsecured creditors. And specifically would like to address the statements made by Mr. Richman suggesting that there was some sort of collusion or influence in the formation that was intended to dictate the outcome with respect to the 363 sale.

I can say unequivocally there was no communication between the office of the United States Trustee and any member of Treasury, the Auto Task Force or the United States Attorney's office representing the Auto Task Force in the formation of the committee. The determination was made strictly within the United States Trustee's program under the standards that have been applied in all bankruptcy cases. And there is absolutely, and I would like to make it quite clear, no influence and no intent on the part of the United States Trustee to form a committee solely for the purpose to advance the approval of the proposed 363 sale.

And in that regard, as mentioned, the United States Trustee appointed a fifteen member committee. As indicated, that committee is composed of seven different groups of creditors. There are pension obligations, employee obligations, trade claims, dealer claims, tort claims, asbestos claims and the bondholder claims. As indicated, two indentured trustees representing all of the bond issuances were appointed to the committee.

Also as indicated, at the organizational meeting there

were, in fact, three representatives of bondholder interests that registered their appearance, the two indentured trustees and an individual bondholder. The individual bondholder did not remain to be interviewed by the United States Trustee and we were, therefore, unable to consider that individual for appointment on the committee.

Also as indicated, the United States Trustee did reach out, after the formation of the official committee, to the unofficial committee to inquire whether or not there were any members who were interested in serving on the committee and the response was in the negative.

Your Honor, the U.S. Trustee believes that given the burden that the unofficial committee, as a moving party there, is with respect to the establishment of adequate protection of the lack of adequate protection would believe that the failure and the refusal of the committee -- unofficial committee members to serve on the official committee should weigh heavily with respect to the claim of lack of adequate representation.

Also we'd like to point out, as we did in our papers, that in the interview that the U.S. Trustee conducted with respect to their various creditor constituencies, the U.S. Trustee specifically questioned the indentured trustees regarding their fiduciary obligations and received representations from both indentured trustees that they were able to operate as fiduciaries for the entire unsecured

creditor class in these cases even though or even if a majority of the bondholders had committed themselves to support the debtor's proposed sale.

The indentured trustees were not bound or circumscribed in any manner in seeking the maximum recovery on behalf of all of the unsecured creditors as a fiduciary to the unsecured class -- the class of unsecured creditors.

Finally, Your Honor, to address the various factors that have been indicated, again I will quickly go through the factors that in fact has been articulated by the various parties and in the papers. Certainly the nature of this case, although large and arguably perhaps even complex, is not a very difficult case in that the major goal in this case is really what is the consideration to be realized from the sale of substantially all of the debtor's assets. And in this regard, we believe that that goal is the same goal as the goal in common with the committee as a whole as well as its individual constituents, including the unofficial committee of F&D bondholders.

Therefore, as indicated previously, since the indentured trustees are not constrained, even by a majority vote of bondholders in favor of the sale, the indentured trustees could and should have independently determined the validity and the merits of the proposed 363 sale. And in that regard the family and dissident bondholders interests are

directly represented in the committee and in the case.

One of the other factors raised is the factor of whether or not the official committee has been able to function. And as indicated by debtor's counsel and I believe as represented by the official committee and its papers and response to the motion, the committee has been functioning properly, has been functioning effectively and is not, as indicated, deadlocked in any manner that would render it ineffective.

Certainly, as indicated -- I don't think I need to go into detail, the pleadings that have been filed by the unofficial committee indicates that a level of legal and financial sophistication sufficient to guarantee an appropriate participation within the case. And certainly, as indicated before without having to go over the factors again, the unofficial committee's counsel certainly has the opportunity to apply for 503(b) recovery with respect to their expenses as an administrative expense. There is no bar to that request and therefore their participation, if resulting in a substantial contribution to the estate, would allow them to recover those expenses.

Furthermore, as indicated in our papers, there's no evidence that the unofficial committee members or the family and dissident bondholders as a group or as a community will be discriminated against under a plan. I believe that the

recovery that is sought under the 363 sale will effectively benefit all unsecured creditors equally. There is no discriminatory treatment that has been alleged that would occur pursuant to a subsequent plan of reorganization.

Accordingly, taking into account all of those factors it does not appear that a separate committee of family and dissident bondholders is warranted in this case given the additional cost that would be generated simply in order to represent this unique, individual point of view.

Accordingly, the United States Trustee respectfully requests the Court to deny the motion seeking an order directing the appointment of an official committee of family and dissident bondholders.

THE COURT: Okay. Thank you.

MR. MASUMOTO: Thank you, Your Honor.

THE COURT: Creditors' committee, Mr. Eckstein, Mr. Schmidt, would you care to be heard?

MR. ECKSTEIN: Your Honor, good afternoon. Kenneth Eckstein of Kramer Levin appearing on behalf of the Official Committee of Unsecured Creditors in the General Motors Corp., Chapter 11 cases.

Your Honor, the creditors' committee has carefully considered the motion by the family and dissident ad hoc committee for the appointment of a separate committee. The official committee agrees that the Winn-Dixie and Enron

standards are the factors that should be applied by this Court. And after careful consideration it has determined that the factors in these cases weigh heavily in favor of the Court denying the motion.

Allow me to speak to several of the points that have been raised by the movants, in particular with respect to certain comments made with respect to the role and function of the official committee.

I think, as Your Honor has already seen from the papers and has heard from the presentations, the official committee in this case is a large and diverse committee consisting of fifteen members. As Your Honor, I believe, is aware, there are two indentured trustees serving on the committee in addition the committee includes the PBGC, the IUE, the UAW, the United Steel Workers Union, there are three trade and supplier representatives, there are three dealer representatives, there is a representative of asbestos claimants and there are two other tort claimant representatives on the committee.

It is significant that when the committee was formed, as we understand, none of the individual bondholders that either are members of the ad hoc or unofficial movants in this case or that are consulting with the movants in this case sought appointment to the official committee.

Your Honor, I can confirm first hand that the

committee is functioning actively and dynamically on a wide array of issues in these cases. There is no question that the first standard that applies to whether or not there is a need or a basis for appointing additional committees is not met here. There is no evidence whatsoever that the committee is not functioning. And I believe that every party that is actively involved in these cases would confirm to Your Honor that the committee is playing an around-the-clock, active and, we believe, very effective role in dealing with the pressing issues that are affecting this case.

Your Honor, over the last several weeks and on a daily basis we are dealing on an active -- an interactive way with the debtor, with the U.S. Treasury, with the ad hoc bondholders committee, with representatives of tort claimants, with the unions and with the other parties that have an interest in the outcome of this case. I can represent to Your Honor first hand that there are many competing interests that have to be considered, both in connection with the propriety of the proposed 363 sale and what the results will be from a transaction if one is approved and how those results will impact upon the interests of unsecured creditors.

The issues are complex and we in fact believe that those interests are being well served through the role of the official creditors' committee and from the involvement of multiple constituencies and multiple interests with multiple

goals and multiple needs sitting in one room and expressing their respective voices within a large and diverse official committee.

Your Honor, Mr. Richman made a great deal out of the fact that the official committee has not responded to the motion. And he suggested maybe not having the benefit of full information that the committee has somehow abdicated its responsibility or its intent to take a position on the sale. The fact of the matter is that the committee's deadline to respond to the 363 sale has been extended to tomorrow, Wednesday, at noon. And the committee certainly intends to submit a response to the 363 sale, and it will be a detailed, substantive response.

The fact of the matter is, that we are continuing to meet today. We've met over the weekend. We met yesterday and I expect we'll continue to meet tonight dealing with an extensive list of issues that the committee is considering many of those issues directly impact an interest bondholders and other unsecured creditors and how they're implicated by the sale. And we believe that it's in fact quite advantageous that the committee has deferred submitting a response. We don't believe it would have been useful to respond prematurely because we believe that significant progress will get made through the dialogue that is taking place. But I don't want it to be suggested by an omission on the record that the committee

has, in any way, abdicated its responsibility to respond. The committee will be responding tomorrow by noon with a substantive response. I cannot represent that it will necessarily be precisely what Mr. Richman wants to hear but we believe it'll be a significant and valuable response for the Court.

The fact of the matter is that notwithstanding the role that the official committee is playing, that the ability of various interested parties in this case to respond to the proposed sale motion in a substantive fashion is not lost. In fact, already four members of the official committee have filed objections to the sale. So the fact that they are serving on the committee has not eliminated the ability of individual creditors to express their interest. The IUE has filed a response. The asbestos claimant has filed a response and the two tort claimants have filed responses, in each case objecting in a substantive fashion to the sale.

I also had the occasion to see that Mr. Richman's firm has filed an extremely substantive response to the sale. And I believe that goes directly to one of the critical factors that the Court has to consider in determining whether or not there is or is not a basis to appoint an additional committee. And that is whether or not the movants or the objectors in this case can affectively be represented. The reality is, Mr. Richman has submitted an extremely substantive response and

there's no question, by reading his papers, that they are in a position to effectively advocate the very substantive issues that have been raised. And I don't want to, for a minute; minimize the importance of the issues.

And the fact of the matter is, given their ability to have submitted a thirty-page, substantive legal objection it's clear they don't need official committee status in order to raise and present the issues and insure that there's going to be an effective dialogue on what Mr. Richman has characterized as issues of importance to the Court and to the public at large. Official committee status is not necessary for the voice to be heard and for the issues to be raised. Whether or not it affects compensation issues should not be a driving factor in whether or not the Court decides to appoint an official committee.

Your Honor, as we look at this case, we concur with the comments made by debtor's counsel that if one were to accept the position that has been articulated by Mr. Richman, I would submit that one probably could adopt that same position for multiple constituencies in this case.

As the committee has determined with respect to this motion, the committee that's been appointed is large, is diverse, as we can best tell represents the complete panoply of unsecured creditor interests in this case. And we believe that the official committee provides the appropriate vehicle through

which the interests of unsecured creditors can be expressed. To the extent there is opposition, we believe Mr. Richman and others have already demonstrated an ability to raise those oppositions. And we believe the merits of those positions can and will be heard by the Court when the 363 sale motion is considered next week.

For all of those reasons, Your Honor, the official committee believes that the motion that's currently being heard should be denied.

THE COURT: Okay.

MR. ECKSTEIN: Thank you.

THE COURT: I think I've now heard from everybody who's filed papers on this matter. Do I have somebody who didn't file papers who's rising to be heard?

MR. FELDMAN: Yes, Your Honor. David Feldman, Gibson Dunn on behalf Wilmington Trust.

THE COURT: All right. Mr. Feldman, considering all the talk that's been made about your client, I think I'd like to hear what you have to say.

MR. FELDMAN: Good afternoon, Your Honor. Again, David Feldman, Gibson Dunn & Crutcher on behalf of Wilmington Trust, the indentured trustee for more than twenty-three billion dollars of the bonds in this case.

I don't want to repeat much of what Mr. Eckstein has already gone through but let me confirm a few items.

Wilmington Trust, like the official committee of unsecured creditors does not have an objection deadline, a response deadline until tomorrow at noon. We have been in careful consideration of the motion that has been filed, have been in detailed and ongoing and extensive conversations with the committee, with the committee's legal and financial advisors, with the other ad hoc committee of bondholders and their advisors as well as receiving calls from numerous individual bondholders that have come into my client and into my firm.

I know the one constituency that has not reached out to us in any capacity is Mr. Richman or his client. But frankly, our objection deadline is not until tomorrow and we'd be happy to speak to them as well. We have, in fact, read their pleading and understand their positions. But there are, obviously, in this case many, many bondholders. We represent from the largest financial institution to the thousands and thousands of Americans who hold these bonds in their individual capacity.

Wilmington Trust understands its fiduciary duty to its full constituency and is taking that fiduciary duty very, very carefully -- is taking that fiduciary duty very, very seriously, both as indentured trustee for the bondholders and as a member and chairperson of the official creditors' committee.

A couple of other points that I'd like to make. There

was some allusion, in Mr. Richman's comments, to some predetermination on the part of the various players. Again, we haven't filed a pleading in this case. Frankly, our involvement and discussions with the various parties in this case about the sale motion, about the structure of this case, really didn't fully engage until after the deal had been baked and the deal had been filed. So Wilmington Trust certainly was not a party to that process beforehand.

So Your Honor, I guess the point that I would leave with, and this is an issue that we did discuss at some length with the United States Trustee when we were appointed to the committee, is that we have an independent and objective duty to represent all of our constituents. Frankly, our indenture speaks to the notion that we consider not only what the majority would like to do, and I'll pause there for a moment because I'll note while much has been made about whether and to what extent Paul Weiss and that ad hoc group represents a majority of bondholders. I will say that to date we've not been instructed by any majority to take any position, one way or the other. And we have, in fact, in our view, all actions that we've taken to date and will take in the case, unless and until instructed by a majority, will be in an exercise of our objective assessment of the situation and the facts and the law at hand.

I will note, though, even if we were to receive a

direction by the majority of the bondholders in any particular issuance, based on our indentures we don't always have to follow the direction of the majority. We have the ability -- we're governed by two different indentures and certainly under our ninety-five indenture, which is the great bulk of where our bonds sit, we have the ability to consider not only what the majority of people would like to do but also the minority holders. And we take, again, our obligations and the provisions set forth in our indentures very seriously and we've carefully considered all the issues. And we will take whatever position we will take in connection with tomorrow's deadline or whatever deadline ultimately is applicable to Wilmington Trust as indentured trustee.

Thank you, Your Honor.

THE COURT: Okay. Thanks.

MS. CHRISTIAN: Jennifer Christian --

THE COURT: I can't hear you but I will invite you to come on up.

(Pause)

THE COURT: Forgive me. Would you mind introducing yourself again, please?

MS. CHRISTIAN: Yes, Your Honor. Jennifer Christian of Kelley Drye & Warren for Law Debenture Trust Company of New York, the indentured trustee.

THE COURT: Your last name again, please.

MS. CHRISTIAN: Christian.

THE COURT: Okay. Thank you. Go ahead, Ms. Christian.

MS. CHRISTIAN: We represent Law Debenture the indentured trustee for the debtor's revenue bonds.

THE COURT: Okay.

MS. CHRISTIAN: Your Honor, as Wilmington's counsel stated, as Wilmington does, Law Debenture takes its fiduciary duties very seriously, both with respect to its holders and with respect to the general unsecured creditors. Law Debenture, too, is a member of the unsecured creditors' committee. We'd just like to address some of the comments that were raised by Mr. Richman.

First of all, we represent all the bondholders under the indenture, not just one subset or another. And the indentured trustee is ready, willing and able to listen to its holders and the subset of holders and make any arguments that it deems appropriate before the Court. But we were not contacted by these holders or their counsel and we just wanted to make that clear.

Mr. Richman also alluded to some predetermination that Wilmington -- excuse me, that Law Debenture had made in connection with the transaction and that is, in fact, not the case. And in fact Wilmington is a successor trustee and became involved in the case shortly after it was filed.

So we just wanted to clarify some of those comments that were made for the record.

THE COURT: Okay.

MS. CHRISTIAN: Thank you very much.

THE COURT: Thanks. All right. I'll take reply from Mr. Richman and any surreply from anybody else. In each case, limited to the stuff that was brought up ahead of you.

MR. RICHMAN: Thank you, Your Honor and thank you for the comments you made from the bench before, I appreciate it. In this courtroom today I know I'm not very popular.

I think that listening to the comments that were made by the indentured trustee, both of them, and the committee it keeps in my mind resounding to the point I made in my opening which is that yes we have representation on the committee but no it's not adequate. And I wasn't intending to accuse the indentured trustees of breaching their duties but it's quite clear, when one listens to how they approach their duties in this case, that giving adequate representation to this distinct route of small bondholders, non-institutional bondholders, who, in numbers, are far, far in excess of the institutional bondholders who reportedly supported the government's plan and are represented by Paul Weiss and the ad hoc committee. It's quite clear that they can't be said to be adequately representing, and I thought it was revealing that neither of them indicated that they would object. And while they said we

didn't get in touch with them, they've had our papers and I'm sure they've read them.

And I was, in fact, a little distressed to hear from the committee that they have been communicating on a regular basis with the ad hoc committee and other constituencies that aren't on their committee. But again, knowing our position no one has actually reached out to us and tried to do anything to accommodate our positions in the process.

Again, it says to me that while -- and I didn't say that the creditors' committee wasn't functioning; I just said in the circumstances any representation of this particular group could not be adequate.

The ad hoc committee, the report that some fifty percent or fifty-four percent support the government's plan, I have to tell Your Honor, that in the same way that I was stopped for putting hearsay in the record, there's been no verification of that in any source that I've read. And I've seen numerous press accounts of it but I've seen no tally of it nor methodology for tallying it or any other way of understanding how it's reliable. But people keep using it and referring to it as though that means that other bondholders should stand down because the majority support it. That's just not evidence that is of record anywhere that I've been able to tell.

Obviously I did not know that an extension had been

given to the creditors' committee or to the trustees until tomorrow. I wish somebody had told me that but I did not know that.

Lastly, going back to Mr. Miller's comments, I think the argument that he made with the most vigor was a concern that the policy we were articulating or the rule we wanted Your Honor to follow was that any time there's a group that has a disagreement of position with a creditors' committee that you should appoint an additional committee. I thought I was pretty clear that we were not saying that. This is a unique case. The 363 transaction is the case. This is not just a motion in passing where we have a difference in judgment from the committee. The whole case is predetermined if the 363 transaction goes forward. And therefore, in the very unique circumstances of this case it is not just a difference of opinion but it is, again, the central question of adequate representation.

The positions that the official committee and the indentured trustees take or don't take, with respect to this very transaction is the entirety of the case, that's what makes this difference and that's why the fact that we do have a very substantive point of view that has not been put on the record and not been followed by any constituency that we can see, although there seem to be tons of individuals that are making similar arguments in a dispersed way, we haven't seen

representation of that important position or voicing of that opposition or any suggestion that Your Honor will be given a vigorous opposition to this on June 30 and thereafter in the record.

My last point, I'm not and I did not suggest, in fact Your Honor asked me this directly; I didn't say ignore the six factors, what I said was that they need to be construed in the context of what the statute says, which is why I draw it back to adequate representation. And I believe that in my opening presentation I did argue and demonstrate that as to those factors, in the unique circumstances of this case plus what I think for this case is another factor; those six factors are not exclusive. The very important public interest and benefits to the administration of justice and transparency in a process like this, which is so unusual none of us has ever seen it before and we may never see it again. It is very, very unusual, so important that it be done with transparency so that the people, and particularly the bondholders, the trustees told about the calls and e-mails they've been getting, I've been getting them too. This isn't just about fees and expenses it's also about an ability to be able to say to the bondholder world yes your rights are being protected.

I got calls and e-mails from people who only heard that there was an objection deadline by a notice that they got after the deadline and they don't know what to do. And I can't

give them individual advice. I can't have attorney/client relationships with 1,500 bondholders. But if there was an official committee, we could communicate with them through the web, through internet sites. We could tell them we're speaking for you; we're giving voice to your grievances; your rights will be protected. We may not prevail but we will speak for you. That's a very important distinction existing in this case that so far as I know has not existed in any of the others, Your Honor.

Thank you.

THE COURT: Okay. Thank you. Everybody had a chance to speak their peace, Mr. Miller.

MR. MILLER: If Your Honor please, there's an old maxim that says, when you don't have the law and you don't have the facts then argue policy and that's exactly what Mr. Richman is doing, Your Honor. He can't make a case under the applicable, principals of law and apply it for the appointment of additional committee.

And basically, if you listen carefully, what Mr. Richman is saying that if the official committee doesn't object then it doesn't adequately represent the bondholder community.

Now we've heard from the representatives of the two indentured trustees saying explicitly that each indentured trustee has an obligation, a fiduciary obligation, to represent all of the bondholders, whether they're institutional or

whether they're individuals. And that's what the indentured trustees are doing, Your Honor.

Saying that I believe that the official committee is not going to file an objection to the 363 transaction automatically requires the appointment of an additional committee, Your Honor, is just inconsistent with all of the applicable principles of law. And it's not that there will be no voice, Mr. Richman has a bold, clear voice. He has filed papers. He will be able to present whatever position the three members of his ad hoc committee want to present.

As so far as other creditors are concerned, Your Honor, there are numerous websites, there are numerous places where creditors can go and there has been a lot of dialogue and a lot of contact by other debenture holders. There is nothing in this record, Your Honor, that shows that this official committee does not adequately represent all of the bondholders. There are bondholder representatives on this committee. It's consistent with everything that's been done in this district for the last fifteen years. And there's nothing in this record, other than the rhetoric which Mr. Richman alludes to about the integrity of the court and the transparency.

The Bankruptcy Code has a process, Your Honor. It prescribes the appointment of a representative committee. And what the U.S. Trustee did in this case is appoint a committee of the different kinds of claims involved in this case and that

committee adequately represents the interest of all the unsecured creditors. And there's nothing else that has been presented to this Court today that would change that fact, Your Honor. Mere rhetoric about transparency does not sustain the burden of proof which is on the movants, Your Honor. And therefore this motion should be denied, Your Honor.

THE COURT: All right. Thank you. All right. Folks, we're going to take a recess and I would like you all back by twenty of four. We're in recess.

(Recess from 3:20 p.m. until 4:10 p.m.)

THE COURT: I apologize for keeping you all waiting. In these jointly administered cases under Chapter 11 of the Bankruptcy Code an ad hoc committee, identifying itself as the ad hoc Committee of Family and Dissident GM Bondholders, moves for an order of this Court appointing an additional official committee to represent unsecured bondholders.

Its motion is opposed by the debtors, the Office of the United States Trustee and the creditors' committee. The United States Trustee, raising institutional concerns, also asked me to defer deciding the motion by reason of a threshold issue pending implementation of promised debtor compliance by the ad hoc committee with the requirements of Federal Rule of Bankruptcy Procedure 2019.

For reasons I'll articulate hereafter, I believe that the motion can and should be decided today. And on the merits,

the motion is denied. The following are my findings of fact, conclusions of law and bases for the exercise of my discretion in connection with this determination.

As facts, I find that on June 3, 2009, two days after the commencement of the instant Chapter 11 cases, the U.S. Trustee appointed an official committee of unsecured creditors of the type that we usually see in medium and large Chapter 11 cases. Before appointing the committee, the U.S. Trustee interviewed perspective members and inquired as to who was interested in serving. The creditors' committee, as appointed by the U.S. Trustee, was about twice as large as is typical in our larger Chapter 11 cases and has fifteen members.

GM has creditors of many different types and so does the creditors' committee. The creditors' committee's fifteen members, as appointed by the U.S. Trustee, include the PBGC, which is the guarantor of GM's pension plans; three unions, which are collective bargaining representatives for GM employees; two supplier creditors; a trade service creditor, three dealers; two tort claimants; an asbestos claimant and, as relevant here, Wilmington Trust Company and Law Debenture Trust Company the indentured trustees for all of GM's bonds, including the bonds that the ad hoc committee members hold

Both indentured trustees have stated, unequivocally, that their legal and fiduciary obligations to all bondholders are in no was circumscribed by any decisions that have been

made or may be made by individual bondholders, including the apparent but not yet definitely established decision by a majority of the bondholders to support the proposed sale of substantially all of the debtor's assets.

Counsel to the ad hoc committee has advised the U.S. Trustee's office that none of the ad hoc committee's members wish to serve on the official creditors' committee.

On June 9, 2009, the ad hoc committee asked the U.S. Trustee to appoint a separate, additional committee of unsecured bondholders. However, after considering the request the U.S. Trustee declined to do so.

Based on the undisputed facts set forth in the motion papers and the ad hoc committee's failure to give me any further evidence that would cause me to come to a different view, I find that the official committee, especially since it has the two indentured trustees, adequately represents the interests of all unsecured creditors of the debtors. I have seen no evidence and have no reason to believe that the interests of bondholders wouldn't be satisfactorily represented by the official committee or especially the two indentured trustees.

I further find that the ad hoc committee is free to appear and be heard on any issue in this case, without having been designated as an official committee. And that the quality of its representation has been highly capable and vigorous.

But especially in light of that, I also must and do make another finding of fact. The conclusion is inescapable that the ad hoc committee is making this request because it wants the estate, which means as a practical matter all of GMs other creditors to pay its legal fees and the costs for any financial advisors the ad hoc committee might wish to retain.

I finally find, as a mixed question of fact and law for reasons I'll address momentarily, that the appointment of an additional official committee of bondholders in this case is not necessary to assure adequate representation of creditors or of the subset of creditors or bondholders.

Turning, now, to my conclusions of law and the bases for the exercise of my discretion in connection with this determination. First on the threshold issue raised by Mr. Masumoto on behalf of the U.S. Trustee. Mr. Masumoto properly comments on the importance of Bankruptcy Rule 2019 and the need to comply with it. And he's also right when he says or implies that the last thing we want to do is to permit people to say that they speak for other people when they fail to comply with Bankruptcy Rule 2019.

But here Mr. Richman has stated that he'll supplement his earlier submission to comply, and he's a man of his word. The issues before me are otherwise capable of determination today. In the exercise of my discretion, where I've received assurances that the deficiencies in compliance will be promptly

remedied, I think I should decide the issues today.

Turning, then, to the merits. Section 1102(a)(1) of the Code provides "Except as provided in paragraph 3, as soon as practicable after the order for relief under Chapter 11 of this title, the United States Trustee shall appoint a committee of creditors holding unsecured claims and may appoint additional committees of creditors or of equity security holders as the United States Trustee deems appropriate."

Subsection 2 of 1102(a) goes on to say that "On request of a party in interest, the Court may order the appointment of additional committees of creditors or of equity security holders if necessary to assure adequate representation of creditors or of equity security holders."

As the U.S. Trustee observes, and as would follow from the use of the word "may" in 1102(a)(2) the statutory scheme, as implemented in Section 1102(a) gives the Court the discretion to order the appointment of an additional unsecured creditors' committee if necessary to assure adequate representation of a separate group of unsecured creditors.

But the appointment of an additional committee, under Section 1102(a)(2) is considered an extraordinary remedy. See, In re Enron Corporation 279 B.R. 671 (Bankr. S.D.N.Y. 2002) decision by my colleague Judge Gonzales, affirm 2003 U.S. Distr. Court LEXIS 18-149 (S.D.N.Y. October 9, 2003); In re Dana Corp. 344 B.R. 35, pg. 38, decision of the Bankruptcy

Court, my colleague Judge Lifland in 2006. And as I noted, the issue is within the discretion of the Bankruptcy Court.

Now we had some colloquy with respect to how I should make that discretionary determination, especially after Mr. Richman's clarifications, I think we now all agree that while we bankruptcy judges start with the words of the statute, as I've just done, we also make determinations based upon applicable case law that imposes requirements, standards or factors to consider beyond those that emerge beyond the bare words of the statute. That's especially true where decisions are discretionary and courts have articulated factors for other courts to consider.

Those factors aren't always exclusive, in fact they typically aren't but we judges routinely apply the factors that have been applied in cases before us. Examples -- by way of examples and there are many of them include the Sonax factors for relief from the stay. Here the case law, much of it in this district, whereas I've stated in writing before, consistency is very important, lays out many underlying standards and factors for courts deciding motions of this character to apply. Specifically, in requesting an additional committee the applicant has the burden of proving that the appointment of an additional committee is necessary to insure adequate representation of the moving party. See Enron 279 B.R. 685; In re Dow Corning Corp. 194 B.R. 121 decision of the

Bankruptcy Court in the Eastern District of Michigan, 1996, reversed on other grounds 212 B.R. 258, District Court decision out of the Eastern District of Michigan in 1997.

Likewise, the party seeking the appointment of an additional committee bears the burden of demonstrating that its interests are not adequately represented. See In re Winn-Dixie Stores, Inc. 325 B.R. 853 p. 857, decision of the (Bankr. MD Fl) in Jacksonville, as best I recall, in 2005.

In most cases only one committee of unsecured creditors is appointed which committee generally represents the best compromise of adequate representation, efficiency and economy. See, for example, In re Sharon Steel Corp., 100 B.R. 767, (Bankr. WD Pa, 1989).

As all parties, including the movants, seem largely to agree, the determinative factors in considering the adequacy of representation by an official committee of unsecured creditors have included (1) the ability of the committee to function; (2) the nature of the case; (3) the standing and desires of the various constituencies; (4) the ability for creditors to participate in the case even without an official committee and the potential to recover expenses pursuant to Section 503(b)(3) of the code; (5) whether different classes may be treated differently under a plan and thus need representation; (6) the motivation of the movants; (7) the cost that would result if the Court grants the motion and (8) the task that a committee

or separate committee is to perform. See, for example, Enron, Winn-Dixie, Dana.

This has been held to be a non-exclusive list, thus a court may consider other factors in exercising its discretion as well. See, for example, Dana 344 B.R. 38. No one factor is dispositive and the amount of due consideration given to each depends on the circumstances of the particular Chapter 11 case. See, for example, Dana 344. B.R. 38.

Turning now to those factors, the first is the ability of the committee to function. There has been no showing that this creditors' committee can't function. There has been no proof or any other indication by way of example, that the committee has been deadlocked, has been unable to gather up a quorum or has had so much discord that it couldn't do its job. And it includes, amongst its members, two highly experienced indentured trustees who have confirmed that they know their fiduciary responsibilities and will comply with them.

The second factor is the nature of the case. The ad hoc committee asserts that the large size of this case warrants the appointment of an additional committee of unsecured creditors, and that's simply not so. A similar argument was made and rejected in Dana, see 344 B.R. 39. And in Adelphia, for example, on my watch which involved about seventeen billion dollars in debt and where there was significant interdebtor and intercreditor disputes, we still had one creditors' committee.

Of course, individual creditor groups have different perspectives and believe me I heard about them but we still had only one committee.

In Dana the Court rejected the argument made by the moving party that because it had only one representative on the Dana committee the other members of that committee would be dominant and would overpower their representative. The Dana court reminded parties that the different interests of the membership of a statutory committee need not be aligned and that the presence of potential conflicts among the different interests of committee members does not necessitate the appointment of additional creditors' committees to provide adequate representation.

In fact, a point that was made to me in argument is both correct and noteworthy. It's not uncommon in Chapter 11 cases, particularly large ones, for individual creditors or ad hoc committees of creditors to differ with the official creditors committee as to the desirability of future courses of action.

In fact, I can think of very few cases, among those on my watch, where there wasn't a disagreement of that character. But that doesn't equate to a basis for the conclusion that creditors or creditors of a different class aren't being properly represented nor does it dictate the appointment of different committees to fund the articulation of the differing

views.

Mr. Richman, recognizing that general rule said that this case was special but I cannot agree because creditors' committees, by their nature and by the efforts of U.S. Trustees doing their jobs, reflect different perspectives by design, individual creditors will have different perspectives than the official committee in many, if not the majority, of Chapter 11 cases. But in the absence of much more that has not been regarded as a basis for appointment of additional committees.

The issue is whether the official committee is representative of the different kinds of unsecured creditor claims involved in the Chapter 11 cases. We plainly have that here. It's well established that the membership of an official committee need not be an exact replica of the creditor body. See, for example, Dana 344 B.R. 39; Enron 279 B.R. 690 and Hills Stores 137 B.R. 4, p. 7, another decision in this district, 1992.

The next factor is the standing and desires of the constituencies. Of course the ad hoc committee has standing to be heard, that's a right it has under Section 1109 of the Code. And the ad hoc committee doesn't need to be appointed as an official committee to achieve that end. And it doesn't need the appointment of others to put forward its views as it's free to assert them itself.

Then turning to a movant's desires, of course they

can't be determinative because everyone wants to fight their fights using someone else's money. And while the ad hoc committee's desires may be different then those of many of the other bondholders, perhaps the majority though the number at this point doesn't matter, bondholders still hold the same bonds and there's no showing that the indentured trustees lack the intention or ability to do their jobs.

The next factor is the ability to continue participating and recover costs. Well, we've already discussed the ability of the ad hoc committee to continue participating in this case and as we've all seen, the ad hoc committee is represented by competent counsel and it hasn't hesitated to participate in this case. It's free to continue to do so as it considers appropriate. If it does, I'll be considering its views, just as I did today, as I'll be considering the views of every other stakeholder in this case. Likewise, if at the end of the case the members of the ad hoc committee believe they've made a substantial contribution, they'll be free to file a request under 503(b).

As the debtors have argued, the ad hoc committee's request is, in substance if not also in every respect, an effort to make someone else pay their fees. But when requests of that nature are made and people say that the fees will thus have to be absorbed by the debtors, what they're really saying is that the fees will have to be absorbed by other creditors.

Unfortunately, we bankruptcy judges not infrequently see efforts by creditors to litigate on someone else's dime. But as the many cases I've noted above hold, we permit that only in extraordinary circumstances. Here the cost of one or more additional committees can be substantial since the appointment is closely followed by applications to retain attorneys and accountants, see Dow Corning 194 B.R. 143. The additional cost that would result from this request cannot here be justified.

The next factor is whether different classes may be treated differently. This factor, too, dictates against the formation of a separate committee. I've seen no indication that the debtors propose to treat different groups of bondholders differently.

The next factor is the motivation of the movants. Well, that seems to be pretty clear. The movants seemingly want two things, more money paid out on their claims and they want the estate, that is other creditors, to pay their legal fees. Neither of these is unusual in Chapter 11 cases but neither is a satisfactory basis for appointing another official committee.

The next factor is the costs incurred by the appointment of additional committees, and I've already talked about this. While I'd agree that costs here wouldn't be as great if they would be -- if anyone contemplated a Chapter 11 case that would go on for many months or years, I still require

costs, as a meaningful concern, and this is nevertheless an incremental cost. And history has told us that when somebody else is paying the expenses, spending restraint seems to go out the window. Once more, we don't give out the power to run up such expenses except in extraordinary circumstances.

The last factor that's been identified in the case law is other considerations. But given that all of the factors I've addressed so far so overwhelmingly weigh against forming another official committee, I don't need to consider the additional point that the debtors made, that the appointment of another official committee would slow down a case which some, perhaps many, parties in this case wish to move very quickly.

For the foregoing reasons, the motion is decided today and is denied on the merits. Mr. Masumoto you or your office is to prepare an order in accordance with the foregoing -- to settle an order, two days notice.

Am I correct that we have no further business for today?

MR. MILLER: Correct, Your Honor.

THE COURT: We're adjourned. Have a good day.

MR. MILLER: Thank you, Your Honor.

MR. RICHMAN: Thank you, Your Honor.

(Proceedings Concluded at 4:35 p.m.)

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C E R T I F I C A T I O N

I, Pnina Eilberg, certify that the foregoing transcript is a true and accurate record of the proceedings.

Pnina Eilberg

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